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In The

Supreme Court of the United States

October Term, 1994

JOHN BEY, JAMES JOHNSON, AND E. E. VANBUSKIRK,
in their individual capacities,

Petitioners,

v.

KENNETH L. BISBEE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether governmental employees should be forced to litigate, through trial, a civil rights case in which there is no claim upon which relief can be granted as a matter of law?

II. Whether governmental employees should be forced to litigate, through trial, a case in which a complete lack of evidence has been presented to defeat qualified immunity?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were John Bey, James Johnson, E. E. Vanbuskirk, Converse County Board of County Commissioners, and Kenneth L. Bisbee.

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JOHN BEY, JAMES JOHNSON, AND E. E. VANBUSKIRK,
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PETITION FOR WRIT OF CERTIORARI

Petitioners, John Bey, James Johnson and E. E. Vanbuskirk, respectfully request that this Court grant a Petition for Writ of Certiorari, seeking review of the decision rendered by the Tenth Circuit Court of Appeals on November 3, 1994, and the Order denying Petitioners' timely petition for rehearing and suggestion for rehearing en banc, which was denied by order entered December 20, 1994.

OPINIONS BELOW

The opinion and orders of the Court of Appeal for the Tenth Circuit is reprinted in the Appendix hereto. (App. 1 and App. 15)

JURISDICTION

Respondent brought suit alleging violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985. Petitioners appealed to the Tenth Circuit from the District Court's decision not to grant them qualified immunity on all counts. The Tenth Circuit exercised jurisdiction pursuant to 28 U.S.C. § 1291. The United States Supreme Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254.

APPLICABLE STATUTES

The Statute being construed and determined in this case is 42 U.S.C. § 1983:

> Section 1983 states in pertinent part that, "[A]ny person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, * * * any person * * * to the deprivation of any rights, privileges, or immunities secured by the constitution and laws shall be liable * * * ."

STATEMENT OF THE CASE

Bisbee filed this action in the United States District Court for the District of Wyoming, October 29, 1992, alleging that he was terminated from his employment as a Converse County Deputy Sheriff, by the defendants, without due process, and in retaliation for his exercise of First Amendment Rights. He also included a wrongful discharge claim under State law, and accused the individual defendants of engaging in a conspiracy pursuant to 42 U.S.C. § 1985.

Eventually, all defendants moved for summary judgment urging, among other defenses, their qualified immunity from suit. The district court granted summary judgment to the county on all claims. Respondent cross-appealed to the Tenth Circuit only on this denial in the corresponding case of 93-8087 which is not at issue in this present petition. The court granted summary judgment to the individual defendants on the state law claim and the due process claim, finding that Bisbee had no property interest in continued employment, and, thus, no Constitutional claim of a denial of due process could rise from his termination.

The court denied the individual defendants' motions for summary judgment on the First Amendment and conspiracy claims. Bisbee had alleged that he was terminated in retaliation for a report he prepared accusing his immediate supervisor, Vanbuskirk of mishandling found property. Despite the fact that the undisputed evidence showed that Bisbee's report was not received and

reviewed by the defendants until after Bisbee's termination, the District Court refused to grant defendants summary judgment on the First Amendment and conspiracy claims citing an affidavit by a witness, Greg Way, as establishing that Sheriff Bey had been advised by Way that Bisbee had accused Vanbuskirk of wrongdoing prior to the termination. Defendants immediately moved the court for reconsideration pointing out that the Way Affidavit in fact established that Way had never informed any of the defendants that Bisbee had accused Vanbuskirk of wrongdoing prior to his termination. The district court overruled the motion for reconsideration without comment, and petitioners appealed the denial of qualified immunity to the Tenth Circuit Court of Appeals.

The Tenth Circuit Court of Appeals reversed the district court's decision and found no conspiracy claims pursuant to 42 U.S.C. § 1985. The court affirmed the denial of qualified immunity on the § 1983 claim regarding First Amendment rights. A petition for rehearing and suggestion for rehearing en banc was timely filed on November 15, 1994. An order entered denying that petition was filed December 20, 1994.

RELEVANT FACTS

On July 13, 1991, Deputy Sheriff Keith Lind received information that certain individuals would be travelling from Douglas to Casper to purchase illicit drugs and would be returning that afternoon on Interstate 25. He decided that if he could clock the suspect vehicle in excess of the speed limit, that would provide an excuse to

stop the vehicle and then search it for the drugs without obtaining a search warrant. To that end, he asked another deputy, James Macormic, to assist him in setting up a "speed trap." Macormic then asked Bisbee to assist him. Bisbee parked his patrol vehicle and joined Macormic and, together, they proceeded to the interstate and set up a radar unit, while Lind took up position approximately one mile further east.

None of this operation had been cleared with Vanbuskirk, the supervisor on duty, apparently due to short notice and a desire to limit radio traffic which might alert the suspects. However, Vanbuskirk did overhear some radio traffic and realized that some sort of operation was going on. He checked with the dispatch office but was unable to determine what the operation involved, and so drove out to the interstate to find out. He first contacted Deputy Lind and got the basic outline from him, then proceeded up the interstate to contact the other two deputies. He was concerned in that all his available manpower was involved in the operation, which left the rest of the county without coverage. In general, the sheriff's department leaves the patrol of the interstate to the State Highway Patrol.

When Vanbuskirk arrived at the location where Macormic and Bisbee were operating the radar, he realized that two deputies were in one car, which further compromised their ability to respond to any request for assistance which might arise in other parts of the county. He pulled up next to Macormic's cruiser, rolled down his window and began to question Bisbee regarding their operation and coverage for the rest of the county. Bisbee immediately took offense at being questioned, and the

exchange between Bisbee and Vanbuskirk became confrontational. Bisbee doubled up his fist and began pounding on the window sill of the cruiser. The exchange, according to both Vanbuskirk and Bisbee, was heated. Finally, plaintiff, in response to a direct order, refused, snarling at Vanbuskirk, "F--k Y--, Ernie." After plaintiff yelled obscenities at his supervisor Vanbuskirk, Vanbuskirk suspended Bisbee and orally reported the incident in brief outline to the Sheriff that same evening.

Sheriff Bey asked for a full written report and further directed Undersheriff Johnson to look into the situation. Johnson talked to Vanbuskirk and visited briefly with Macormic who confirmed the outburst. Based on the egregious nature of the behavior, Vanbuskirk felt that termination was warranted and Johnson concurred. This recommendation was reduced to writing and forwarded to Sheriff Bey. Bey, feeling that this behavior was absolutely intolerable on the part of a deputy to a superior, approved the recommendation and terminated Bisbee. This decision was communicated to Bisbee on July 16, 1991.

Bisbee contacted Undersheriff Johnson by telephone at approximately 5:00 or 6:00 o'clock in the afternoon of the 16th and asked what was going on. Johnson told him that he was being terminated for insubordination. Bisbee protested saying, "It must be alright that a supervisor can steal cars or steal guns, but I'm being fired for alleged insubordination that the sergeant had set up." Johnson responded that he did not know what Bisbee was talking about. Rather than explain, Bisbee hung up. Bisbee was officially terminated the next day.

Prior to this confrontation, on July 5, 1991, Bisbee had contact with a citizen named Danny Neumeyer while investigating a break-in at Neumeyer's property. Neumeyer asked Bisbee if any information had ever surfaced on a part of a .22 cal. rifle which he had found in his back yard and turned over to Vanbuskirk for investigation in April. Bisbee immediately became suspicious, in that Vanbuskirk had asked him whether he could obtain a stock for a .22 a few months previous. Neumeyer described the rifle as a .22 cal. Winchester bolt action with an identifying number D23711. Bisbee checked records at the sheriff's office and found that Vanbuskirk had filed a report which Bisbee felt did not match the information he had received from Neumeyer. Bisbee suspected that Vanbuskirk had taken the dismantled rifle and was keeping it for his own.

Bisbee put together an investigative summary of the material he had gathered and the suspicions he had, and contacted Sergeant Greg Way to inform him of his suspicions. Sergeant Way did not want to be involved with the situation because he was at the same level in the chain of command as Vanbuskirk. Thus, Bisbee sealed his report in an envelope, initialing the taped seal to insure that no tampering would occur and, in the presence of Sergeant Way, hand placed the report amongst papers in a lower filing basket on Undersheriff Johnson's desk on July 7, 1991. Unknown to Bisbee or Way, this basket was a "dead letter" basket Johnson used for junk mail and magazines. Undersheriff Johnson was on vacation in Montana at the time the report was placed in his filing basket; he did not return to the Converse County Sheriff's Office from vacation until July 10, 1991.

Sergeant Way did not divulge the information that Bisbee had assembled to any of the defendants. The report remained unnoticed in Undersheriff Johnson's "dead letter" basket until July 17, 1991.

Meanwhile, Bisbee began to become nervous, expecting that his report would cause quite a disturbance. As time went on and he had not been contacted regarding his report, Bisbee decided that a coverup must be in progress. However, he made no attempt to follow up his written report by direct contact with any of the defendants. Bisbee talked to some other deputies regarding his suspicions of Vanbuskirk, but it is important to note that each and every member of the department has been contacted and has either provided an affidavit or deposition testimony and all agree that no one ever told Sheriff Bey, Undersheriff Johnson or Sergeant Vanbuskirk of Bisbee's report until *after* Bisbee's termination.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE TENTH CIRCUIT SHOULD BE VACATED AND REMANDED FOR CONSIDERATION PURSUANT TO THE LATER DECIDED CASE OF *MCKENNON v. NASHVILLE BANNER PUBLISHING COMPANY,* 115 S. CT. 879 (DECIDED JANUARY 23, (1995)).

The decision in the present case was issued November 3, 1994, and rehearing denied December 20, 1994. On January 23, 1995, the United States Supreme Court published *McKennon v. Nashville Banner Publishing Company,*

115 S. Ct. 879 (1995). In *McKennon*, the employee was presumed to be discharged solely because of her age, in violation of Title VII. During the course of discovery, however, a lawful reason justifying termination was discovered and McKennon terminated a second time. The Court held that in situations such as this, neither reinstatement or front pay is an appropriate remedy. The Court stated that it "would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate in any event, and upon lawful grounds." (Slip Opinion p. 6) The Court also stated that the object of compensation is to restore the employee to the position he or she would have been in absent the discrimination. Thus, the employee could not collect damages once a lawful reason for termination occurred. This case reinforced what the Supreme Court said in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). An employee who exercises a constitutional right is not given carte blanc to engage in blatant misconduct.

Plaintiff admits that he told his supervising officer to "get f--ked." That wildly insubordinate conduct standing alone supports termination. Plaintiff's own expert has agreed that those words would support a discharge in a para-military organization which requires cause for discharge. It is undisputed that, as an at-will employee, Sheriff Bey had an absolute right to discharge plaintiff for any reason or no reason at all. He did not need cause.

Even though defendants do not admit that any impermissible reasons influenced the decision to terminate, it is clear that the insubordinate conduct *alone* suffices to support termination, thus stopping all damages,

both front pay and reinstatement, according to *McKennon*. This employee should be put in no better position than he would have been otherwise. Since the insubordinate conduct occurred simultaneous with the termination, he is not entitled to back pay. He is not entitled to any relief whatsoever as a matter of law.

Thus, in the present case, governmental employees are being forced to litigate, through trial, a case in which there can be no award of relief, as a matter of law. The Supreme Court has consistently stated that strong policy considered to protect governmental employees from time consuming and costly litigation. *Mitchell v. Forsythe*, 472 U.S. 511 (1985).

In the past, the United States Supreme Court has granted certiorari, vacated a decision and remanded for reconsideration in light of subsequent U.S. Supreme Court law. See, *Nuveen & Company, Inc., et al. v. Sanders*, 425 U.S. 929 (1976); *Cooney v. White*, 111 S. Ct. 2820 (1991). In the present case, Petitioners ask that the Court grant certiorari, vacate the lower court's decision and remand for reconsideration in light of *McKennon, supra.*

II.

THE TENTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT BECAUSE IT DID NOT FOLLOW THE ANALYSIS SET FORTH IN *MT. HEALTHY CITY BOARD OF EDUCATION v. DOYLE*, 429 U.S. 274 (1977).

The Supreme Court has granted writs of certiorari in situations where the decision indicates a misapprehension of the controlling law regarding the situation. See,

Florida v. Rodriquez, 469 U.S. 1 (1984). In *Ross v. Moffit*, 417 U.S. 600 (1974), the Supreme Court granted certiorari to determine a conflict among several circuits regarding the extent of right to counsel. That decision had an effect on numerous cases because it defined the scope of a constitutional right.

The present case is an hybrid, "mixed motives" case as determined by *Mt. Healthy Board of Education v. Doyle, supra.* Petitioners deny any wrongdoing influencing or tainting their decision to terminate Bisbee. If one believes the Respondent's version of events, however, Petitioners should still prevail under *Mt. Healthy.* That issue was squarely before the Tenth Circuit. Appellants' brief stated:

> Further, given the clear evidence of plaintiff's insubordinate conduct, the Sheriff still would have the right to rely on the rule of law enunciated in *Mt. Healthy.* See also, *Hardin v. Adams*, 760 F.2d 1158, 1165 (11th Cir. 1985). Even if plaintiff's grievance was a motivating factor in the discharge (a proposition which defendants deny and for which Bisbee has advanced no proof), Bisbee's insubordination was sufficient in and of itself to justify a discharge.

(Appellants' Brief, p. 18)

Respondent did not address that issue, nor even refer to it in his brief.

Although the Tenth Circuit set forth the analysis under *Mt. Healthy,* it did not apply the four steps. Once the court determined that plaintiff had put forth sufficient evidence "to create a circumstantial case that he was fired in violation of his First Amendment rights," its

determination of that question ceased under *Mt. Healthy*. That case states that the court must determine that (1) the employee's speech involves public concern, (2) balance the interests of the employee, (3) show that the protected speech was a motivating factor in this decision, and *then*, if the plaintiff meets this burden, the burden shifts to the employer to show by a preponderance of evidence, (4) that it would have reached the same decision in the absence of protected activity.

In the present case, the court absolutely ignored the fourth requirement, that Petitioners had met their burden by showing that the decision for termination would have been reached based solely on the grossly insubordinate behavior of Bisbee. The Tenth Circuit ignored this balancing test and never looked at the lawful and legal supporting reasons for this termination. Thus, the governmental employees were left without the protection which should have been provided by the United States Supreme Court analysis of the situation as set forth in *Mt. Healthy*. This determination totally guts the protection given governmental employees by the Supreme Court and can only have horrifying ramifications to future cases.

For this reason, the decision should be vacated and remanded for proper analysis under a qualified immunity defense grounded in *Mt. Healthy*.

III.

THE DECISION OF THE TENTH CIRCUIT IS EXTRAORDINARILY ERRONEOUS IN ALLOWING LAY OPINION AND INVALID PYRAMIDED INFERENCES TO OVERCOME SPECIFIC, CONTRARY SWORN TESTIMONY BY THE SAME WITNESSES, THUS, DEFEATING A PROPERLY SUPPORTED IMMUNITY-BASED SUMMARY JUDGMENT IN THE FACE OF THE UNITED STATES SUPREME COURT STRONG POLICY DECISIONS TO THE CONTRARY.

Petitioners are aware that the United States Supreme Court is not a court for correction of errors in factfinding. See, *Goodman v. Lukens Still company,* 486 U.S. 656 (1986). In the present case, however, the case is of such importance as to justify the Supreme Court's review. The Tenth Circuit has allowed invalid inferences pyramided upon invalid inferences to be used as supporting facts. Petitioners have unequivocally denied having any knowledge that Respondent made a complaint accusing Vanbuskirk of wrongdoing, and have categorically denied that any such complaint could, or would have motivated them to terminate Respondent's employment.

All Petitioners have testified, and all supporting documents indicate that Respondent was terminated because he engaged in wildly insubordinate conduct which he has admitted and which his own expert has agreed supports termination. Each and every member of the Converse County Sheriff's Department has provided sworn testimony that they did not provide any information regarding this report to any of the Petitioners. Each and every one of these members of the department has testified, under oath, that he is not aware of any other person who

has provided such information to Petitioners. There is no conflict of evidence, there is no inference to be drawn from the mere fact that several members of the department were aware of Respondent's report. The fact that several members of the department knew of Bisbee's report is not evidence, nor even persuasive that Petitioners knew of Bisbee's report. This is particularly true when the very persons Respondent looks to to supply this "evidence" have admitted that they cannot support Bisbee's allegations.

The "facts" relied upon by Respondent are not evidence or even inference. As noted in *Black's Law Dictionary*, Revised Fourth Edition, inference is "a process of reasoning by which a fact or proposition sought to be established is deduced as a *logical* consequence from other facts, or a stated fact already proved or admitted." (Emphasis added.) The only fact before the Court was that the Sheriff was told that Bisbee had filed a report regarding stolen property. It is safe to say that reports of stolen property are a matter of routine in a law enforcement agency. That, after all, is their function. It is not logical to infer that such a report would trigger such a flight of speculation as outlined above; and yet that is exactly the proposition that Plaintiff has advanced to the Tenth Circuit and which it accepted. (Order, App. 8)

This sort of pyramiding of inference upon inference is specifically disapproved by the United States Supreme Court and the Tenth Circuit in a long line of cases. *Direct Sales Company v. United States*, 319 U.S. 703, 711 (1943), *United States v. Jones*, 998 F.2d 883 (10th Cir. 1993), *United States v. Anderson*, 981 F.2d 1560, 1564 (10th Cir. 1992). The Tenth Circuit has stated that it is improper for a judge to

instruct a jury that they may infer knowledge from isolated, unconnected facts and has even more forcefully ruled that a jury may not *find* knowledge from the same facts. *United States v. Williams*, 990 F.2d 507 at footnote 2 (10th Cir. 1993). As the Tenth Circuit has stated in *Kelly v. Roberts*, 998 F.2d 802, 809 (10th Cir. 1993), "it is a basic principle of the law that presumptions and inferences may be drawn only from facts established and presumption may not rest upon presumption or inference upon inference." Yet, in the present case, the Tenth Circuit did not follow these principles.

There was not sufficient evidence presented to overcome the strong policy reasons that the Supreme Court has stated that in *Mitchell v. Forsythe, supra*, that Respondent must come forward with "evidence sufficient to create a genuine issue."

Further, this is not a case where the two courts below had concurrent findings of fact. See, *Goodman, supra*. In the present case, the district court found that an affidavit of Sergeant Greg Way produced a material fact in dispute. It is undisputed that the district court misread the affidavit: it did not create a material dispute of fact. Respondent did not even argue the affidavit of Way as a "fact" in the Tenth Circuit. The Tenth Circuit Court of Appeals believed it found circumstantial evidence, but all it cited was pyramided inferences and speculation. One can only assume that the reason the two Courts did not find the same facts is there are no facts to be found.

CONCLUSION

For these reasons, Petitioners move the Court to grant this petition for certiorari and either vacate the decision and remand for further consideration in light of *McKennon*, or summarily reverse the denial of summary judgment on the First Amendment claims and order judgment for Petitioners, or allow further briefing and hear the case on its merits.

Respectfully submitted this 16th day of March, 1995.

KAREN A. BYRNE

HUGH KENNY

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KENNETH L. BISBEE, Plaintiff-Appellee, v. JOHN BEY, in his individual capacity; JAMES JOHNSON, in his individual capacity; and E.E. VANBUSKIRK, in his individual capacity, Defendants-Appellants, and CONVERSE COUNTY BOARD OF COUNTY COMMISSIONERS, Defendant.	)	No. 93-8081
KENNETH L. BISBEE, Plaintiff-Appellant, v. JOHN BEY, in his individual capacity; JAMES JOHNSON, in his individual capacity; E.E. VANBUSKIRK, in his individual capacity; and CONVERSE COUNTY BOARD OF COUNTY COMMISSIONERS, Defendants-Appellees.	)	No. 93-8087

APPEALS FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. No. 92-CV-252-B)

(Filed Nov. 03, 1994)

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Karen A. Byrne, of Cheyenne, Wyoming, for Defendant-Appellant-Cross-Appellee E.E. VanBuskirk.

Dale W. Cottam (Gary R. Scott, of Hirst & Appelgate, Cheyenne, Wyoming, on the brief), of Hirst & Applegate, Cheyenne, Wyoming, for Defendant-Cross-Appellee Converse County Board of County Commissioners.

Before **TACHA, FAIRCHILD***, and **LOGAN,** Circuit Judges.

TACHA, Circuit Judge.

These two appeals result from a suit alleging violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985. Defendants

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*The Honorable Thomas E. Fairchild, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

John Bey, James Johnson, and E.E. VanBuskirk appeal in their individual capacities from the district court's decision not to grant them qualified immunity. Plaintiff Kenneth Bisbee cross appeals the district court's grant of summary judgment in favor of the Board of County Commissioners of Converse County ("the county"). In the first appeal, we exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm as to the section 1983 claim while reversing as to the section 1985 claim. We dismiss the second appeal because we decline to exercise discretionary pendent jurisdiction.

I. BACKGROUND

In 1991 plaintiff was employed as a deputy in the Converse County Sheriff's Department. Through a chance encounter, he became suspicious that his supervisor, defendant E.E. VanBuskirk, had misappropriated a rifle. After investigating further, plaintiff filled out an incident report asserting that VanBuskirk had violated the Sheriff Department's operating policies. On July 6, 1991, the dispatcher on duty at the Sheriff's Department assigned the report a case number. The dispatcher then entered a message on the computer recording the report number and stating that it contained "sensitive materials." Plaintiff and his supervisor on duty, Sergeant Greg Way, decided to present the report to Undersheriff James Johnson. They sealed the report by taping the envelope shut. Plaintiff placed the report in the lower tier of the undersheriff's letter baskets. At the time, Undersheriff Johnson was on vacation.

On July 13, 1991, plaintiff and defendant VanBuskirk were involved in a heated confrontation at an investigation site. VanBuskirk claims that he was questioning plaintiff because two officers were sitting together in one car, thereby compromising their ability to split up and respond to calls for assistance in another part of the county. During the argument, VanBuskirk told plaintiff that plaintiff was suspended. Plaintiff responded with a derogatory retort. On July 16, 1991, defendant Sheriff Bey, acting on the recommendation of Undersheriff Johnson and Sergeant VanBuskirk, fired plaintiff.

Plaintiff brought suit against defendants alleging violations of his First and Fourteenth Amendment rights. He relied on the statutory remedies provided by 42 U.S.C. §§ 1983 and 1985. He also asserted a claim under Wyoming state law. The complaint alleged that defendants had discharged plaintiff for exercising his right to freedom of speech and that his firing denied him due process.

All defendants moved for summary judgment. The individual defendants claimed qualified immunity. Defendants denied responsibility for all claims, stating specifically that they did not know of the incident report until after plaintiff was fired. Instead, defendants claimed, they fired plaintiff for insubordination. The county moved for summary judgment, stating that no evidence linked the county to plaintiff's termination.

The district court granted summary judgment to the county on all claims. With respect to the individual defendants, the district court granted summary judgment on the Fourteenth Amendment and state law claims. The

court refused to grant summary judgment for the individual defendants on plaintiff's section 1983 and 1985 claims that alleged infringements of his First Amendment rights.

The individual defendants appeal from the district court's denial of summary judgment on the grounds of qualified immunity. Plaintiff cross appeals the district court's decision to grant the county summary judgment.

II. THE DEFENDANT'S QUALIFIED IMMUNITY CLAIM

A. PLAINTIFF'S 1983 CLAIM

A district court's denial of a motion for summary judgment on qualified immunity grounds is an appealable decision under 42 U.S.C. 1291. While section 1291 authorizes appeals only from "final decisions," "[t]he entitlement to qualified immunity 'is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' " *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio,* 847 F.2d 642, 644 (10th Cir. 1988) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985)). Therefore "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell,* 472 U.S. at 530.

The district court's denial of qualified immunity is a question of law which we review *de novo. Yvonne L. v. New Mexico Dep't of Human Servs.,* 959 F.2d 883, 891 (10th Cir. 1992); *Eastwood v. Department of Corrections,* 846 F.2d

627, 629 (10th Cir. 1988). Under the summary judgment standard, we review the evidence in the light most favorable to the nonmoving party. *Eastwood*, 846 F.2d at 629.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Losavio*, 847 F.2d at 645. In evaluating defendants' qualified immunity claims, we must first determine whether plaintiff's allegations, if true, state a claim for a violation of a constitutional right that was clearly established when defendant acted. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

Plaintiff asserts that he was fired because he reported illegal activity within the Sheriff's Department. Defendants concede that, if plaintiff's allegations are true, he has shown a violation of a clearly established constitutional right. *See Mt. Health City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Conaway v. Smith*, 853 F.2d 789, 795 (10th Cir. 1988). The burden therefore shifts to the defendants to show that summary judgment should be granted because there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *Gallegos v. City and County of Denver*, 984 F.2d 358, 361 (10th Cir.), *cert. denied*, 113 S. Ct. 2962 (1993). To defeat a defendant's showing that no material fact exists, "plaintiffs cannot rely on conclusory allegations; they must produce some specific factual support for their claim of unconstitutional motive." *Losavio*, 847 F.2d at 649.

The court must take four steps in assessing an employment retaliation case asserting a First Amendment right. Each step must be satisfied for a plaintiff to prevail. First, the court must determine that the employee's speech involves a matter of public concern. *Melton v. City of Okla. City*, 879 F.2d 706, 713 (10th Cir. 1989), *modified on other grounds*, 928 F.2d 920 (10th Cir.) (en banc), *cert. denied*, 112 S. Ct. 296 (1991). Second, the court must "balance the interests of the employee in making the statement against the public employer's interests in the effective and efficient fulfillment of its responsibilities to the public." *Id.* (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). Third, if the balancing test tips in favor of the plaintiff, then he must show "that the protected speech 'was a "motivating factor" in the decision.' " *Id.* (citing *Mt. Healthy*, 429 U.S. at 287). Fourth, if the plaintiff meets this burden, "the burden then shifts to the employer to show by a preponderance of evidence that it would have reached the same decision in the absence of the protected activity." *Id.* (citing *Mt. Healthy*, 429 U.S. at 287); *see also Powell v. Gallentine*, 992 F.2d 1088, 1090 (10th Cir. 1993) (applying same four-step analysis).

In this appeal, defendants contend that plaintiff has not alleged facts which show that his speech was a motivating factor in the decision to terminate his employment. Examining the facts in the light most favorable to plaintiff, we conclude that he has set forth sufficient evidence to avoid summary judgment against him. A number of facts in the record create the inference that defendants fired plaintiff for filing the stolen property report. At least two persons in the sheriff's office – Sergeant Way and the dispatcher – allegedly read the report,

and a third, Deputy Macormic, allegedly received the report and was aware of plaintiff's complaint. The dispatcher assigned a report number to the complaint, which appeared on the office computer. Sheriff Bey acknowledges that Sergeant Way told him the computer entry referred to information offered by the plaintiff concerning stolen property. One employee described the incident report as "common knowledge" around the office. Finally, no one in the Sheriff's Department questioned plaintiff after the encounter with Sergeant VanBuskirk, arguably leaving the impression that the insubordination was not the reason for his dismissal.

Some of these facts are disputed by the defendants, and none of plaintiff's allegations amount to a "smoking gun" that prove his firing was related to his incident report. Still, "allegations of retaliation are often supported only by circumstantial evidence." *Durant v. Independent Sch. Dist. No. 16*, 990 F.2d 560, 564 (10th Cir. 1993). Plaintiff has put forth sufficient evidence to create a circumstantial case that he was fired in violation of his First Amendment rights. Questions concerning whom to believe in this matter are reserved for the jury. We affirm the trial court's denial of the individual defendants' motion for summary judgment on the section 1983 claim.

B. PLAINTIFF'S SECTION 1985 CLAIM

Defendants also appeal from the district court's denial of summary judgment on plaintiff's section 1985 claim. Section 1985 prohibits persons from conspiring

"for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3).

A.

We must first decide whether we have jurisdiction to hear this appeal. Again, this court has jurisdiction to hear appeals from all final decisions of United States district courts. 28 U.S.C. § 1291. If defendants can claim qualified immunity to a section 1985 claim, we have jurisdiction because a denial of qualified immunity is an appealable final decision. *Mitchell*, 472 U.S. at 530. On several occasions, this court has applied the doctrine of qualified immunity in section 1985 cases without addressing the predicate question of whether the immunity is applicable.[1] *See, e.g., Langley v. Adams County*, 987 F.2d 1473, 1481-82 (10th Cir. 1993); *Gallegos*, 984 F.2d at 363-64; *McEvoy v. Shoemaker*, 882 F.2d 463, 465 (10th Cir. 1989); *Benavidez v. Gunnell*, 722 F.2d 615, 618 (10th Cir. 1983). In addition, at least two other circuits have applied qualified immunity analysis in section 1985 actions. *See Auriemma v. Rice*, 910 F.2d 1449, 1457-59 (7th Cir. 1990), *cert. denied*, 501 U.S. 1204 (1991); *Hobson v. Wilson*, 737 F.2d 1, 19-20 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). It is important to establish the underlying basis for this judgment.

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[1] This court has also applied absolute immunity in cases alleging violations of section 1985. *See Van Sickle v. Holloway*, 791 F.2d 1431, 1434-35 (10th Cir. 1986).

Like section 1983, the text of section 1985 makes no reference to immunities on its face. Over time, however, section 1983 and its federal counterpart, the *Bivens* action, have amassed a large body of immunity precedents. *See, e.g., Butz v. Economou*, 438 U.S. 478, 506-07 (1978) (federal official sued for damages arising from a constitutional violation is entitled to qualified immunity); *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974) (holding that executive branch officers had qualified immunity). The Supreme Court has stated that the reasons for recognizing these immunities are to avoid the "diversion of official energy away from pressing public issues," to preclude the "deterrence of able citizens from acceptance of public office," and to prevent the dampening of " 'the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). These same concerns permeate suits against public officials under section 1985. When a statute reaches action taken by governmental officials, courts must always be concerned about the law's potentially chilling effect on official conduct. Despite these apparent similarities in policy concerns, the Eleventh Circuit has ruled that "public officials cannot raise a qualified immunity defense to a section 1985(3) claim." *Burrell v. Board of Trustees of Ga. Military College*, 970 F.2d 785, 794 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1814 (1993). In *Burrell*, the court reasoned that the need for the immunity safeguard was obviated by section 1985's requirement that plaintiffs show a racial or class-based animus. *Id.* This requirement affords public officials "an additional protection against

section 1985(3) actions that is not present in section 1983 cases, so immunity is unnecessary." *Id.*

We find the Eleventh Circuit's reasoning in *Burrell* unpersuasive. The justifications for the doctrine of qualified immunity enunciated in *Harlow* are equally present in section 1985 claims regardless of the added requirement of racial or class-based animus. If public officials are not allowed to assert qualified immunity under section 1985, then suits may divert these officials' energies away from their public obligations; individuals will be deterred from holding public office; and officials will be chilled in the exercise of their duties. We therefore hold that defendants in section 1985 actions are entitled to claim qualified immunity.

B.

The district court's denial of defendant's claim of qualified immunity was a final order appealable under 28 U.S.C. § 1291. *Mitchell,* 472 U.S. at 530. We have jurisdiction to review the claim on the merits. We review the district court's denial of summary judgment on defendants' claims of qualified immunity *de novo. Yvonne L.,* 959 F.2d at 891.

Section 1985(3) creates a cause of action against persons who conspire to deprive a person or class of "equal" protection or "equal" privileges and immunities. A violation of section 1985 must include class-based or racially discriminatory animus. *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971); *Atkins v. Lanning,* 556 F.2d 485, 489 (10th Cir. 1977). "[I]n the absence of allegations of class based or racial discriminatory animus, the complaint fails to state

a claim under § 1985." *Campbell v. Amax Coal Co.*, 610 F.2d 701, 702 (10th Cir. 1979) (per curiam). Here, plaintiff has made no allegations of race or class-based animus. As such, he has not stated a claim under section 1985. We therefore reverse the district court's decision and grant summary judgment in favor of defendants on plaintiff's section 1985 claim.

III. PLAINTIFF'S CROSS APPEAL

Plaintiff cross appeals from the district court's grant of summary judgment in favor of the county. Importantly, the district court has not entered a final order in this case. Plaintiff's section 1983 claim against the individual defendants remains in the district court. Consequently, plaintiff cannot assert that this court possesses jurisdiction under 28 U.S.C. § 1291. Instead, plaintiff asks the court to rely on its discretionary pendent appellate jurisdiction. We decline to do so. For the following reasons, we dismiss this appeal for lack of jurisdiction.

"Pendent appellate jurisdiction is a matter of discretion, not of right." *Walter v. Morton*, Nos. 93-7060, 93-7072, 1994 WL 467053, at *1 (10th Cir. Aug. 30, 1994). In deciding whether to exercise pendent appellate jurisdiction, we examine whether the legal and factual issues are sufficiently developed for review, whether the issues on appeal are closely related or relevant to the otherwise nonappealable issue, and whether judicial economy would be served despite a policy against piecemeal appeals. *State of Colo. v. Idarado Mining Co.*, 916 F.2d 1486, 1491 (10th Cir. 1990), *cert. denied*, 499 U.S. 960 (1991). We have previously exercised pendent appellate jurisdiction

in an appeal from a denial of qualified immunity where the issues involved were "factually and legally intertwined with the issues on appeal." *Primas v. City of Okla. City*, 958 F.2d 1506, 1512 (10th Cir. 1992).

In order to assess whether to take jurisdiction, we look to plaintiff's assertions on appeal. Plaintiff alleges that the sheriff took two unconstitutional actions that would hold the county liable: (1) as the county's final policymaker, he terminated his employment in violation of plaintiff's First Amendment rights, and (2) he violated plaintiff's due process rights when, as the final policymaker, he did not follow proper procedures after the termination.

"[M]unicipality liability can be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. City of Cincinatti*, 475 U.S. 469, 480 (1986). The county concedes that the sheriff was a policymaker for *Pembaur* purposes. The county argues, however, that these decisions, if unconstitutional, were made in contravention of county policy.

Even if plaintiff proves that the sheriff was the county's final policymaker for employment purposes, we would still need to ascertain whether a municipality can be held liable for the actions of an official policymaker if those actions were antithetical to established policy. *See Auriemma v. Rice*, 957 F.2d 397, 399-401 (7th Cir. 1992). This complex legal issue is unrelated to the individual defendants' appeal of qualified immunity. Because the issues are complex and unconnected to the individual defendants' appeal, we find that the requirements for

pendent appellate jurisdiction are not met. Accordingly, we dismiss plaintiff's cross appeal.

IV. CONCLUSION

We affirm the district court's denial of summary judgment on plaintiff's section 1983 claim. We reverse the district court on plaintiff's section 1985 claim and grant summary judgment to defendants. Finally, we dismiss plaintiff's cross appeal for lack of jurisdiction. The case is REMANDED to the district court for further proceedings in accordance with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KENNETH L. BISBEE, Plaintiff-Appellee, v. JOHN BEY, in his individual capacity; JAMES JOHNSON, in his individual capacity; and E. E. VANBUSKIRK, in his individual capacity, Defendants-Appellants, and CONVERSE COUNTY BOARD OF COUNTY COMMISSIONERS, Defendant.	)	No. 93-8081 (D. C. No. 92-CV-25B)

ORDER

Entered December 20, 1994

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, and FAIRCHILD* Circuit Judges.

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*The Honorable Thomas E. Fairchild, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By /s/ L. illegible
Deputy Clerk